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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION NO.)
41QJ-30013407 TO CHANGE WATER)
RIGHT CLAIM NOS. 41QJ-17073-00) FINAL ORDER
AND 41QJ-17074-00 BY CHRISTIAN C)
AND NORA R HOHENLOHE)

Pursuant to its authority under §§ 2-4-601 et seq., 85-2-310, 85-2-402, 85-2-408, MCA, and Mont. Admin. R. 36.12.201 et. seq, and 36.12.501 et seq., and upon the request of Applicant's Christian C. and Nora R. Hohenlohe, the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on June 24, 2008, to allow Mr. and Mrs. Hohenlohe, hereinafter referred to as "Applicant" for the above application, to show cause why Authorization to Change A Water Right should not be denied based on the Statement of Opinion issued by the Department on January 28, 2008. The purpose of this hearing was to allow the Applicant the opportunity to present all information and evidence as to why the Department's Statement of Opinion denying the Application is in error.

APPEARANCES

Applicant Christian C. and Nora R. Hohenlohe appeared at the hearing by and through counsel, Ms. Abigail J. St. Lawrence. George Liknes, Regional Fisheries Manager, Region 4, Montana Department of Fish, Wildlife and Parks, and Jon Westenberg, Senior Water Right Specialist, PBS&J, testified for the Applicant.

EXHIBITS

Applicant offered seventeen exhibits, A1 – A17, for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1-A17. The following is a list of those exhibits:

A1: Undated pre-project photos of Little Prickly Pear Creek at diversion taken by George Liknes

A2: Letter to Jon Westenberg from George Liknes dated May 23, 2005

1 **A3:** Future Fisheries improvement program grant application completed by
2 Christian and Nora Hohenlohe
3 **A4:** Environmental assessment; fisheries division, MTFWP, Little Prickly Pear
4 Creek irrigation conversion and in-stream flow project
5 **A5:** Photos of Sentinel Rock Ranch fish screen and return pipe after installation
6 before implementing use by George Liknes
7 **A6:** Temporary preliminary decree abstract for Water Right Claim No. 41QJ
8 1707300
9 **A7:** Temporary preliminary decree abstract for Water Right Claim No. 41QJ
10 1707400
11 **A8:** Spreadsheet of contact points
12 **A9:** USGS Stream gauging data
13 **A10:** Letter to Jon Westenberg from Kathy Arndt dated May 4, 2005
14 **A11:** Letter to Kathy Arndt from Jon Westenberg dated June 1, 2005
15 **A12:** Field investigation by Jim Beck dated August 25, 2005
16 **A13:** Letter to Jim Beck from Jon Westenberg dated October 4, 2005
17 **A14:** Quantity of water legally available from instream flow by Jim Beck dated
18 June 15, 2007
19 **A15:** A map of Hohenlohe and Lahti points of diversion
20 **A16:** Temporary preliminary decree for Water Right Claim No. 41QJ 9743900
21 **A17:** Letter to Josephine Lahti from Mark Lere dated March 29, 2004

PRELIMINARY MATTERS

24 The Applicant objected to the hearing being conducted under informal contested
25 case proceedings (§2-4-604, MCA) pursuant to a March 14, 2008 letter from DNRC
26 WRD Division Administrator John Tubbs which stated that the application is in formal
27 proceedings pursuant to the Montana Administrative Procedures Act. The Hearings
28 Examiner noted objection for the record.

29 At the conclusion of the hearing the Hearing Examiner asked counsel for the
30 Applicant, Abigail J. St. Lawrence, if she could provide a written summary of the
31 testimony provided. She agreed and asked to be allowed to submit the summary by July
32 21, 2008. The record remained opened until such time as the written summary was

1 received. All of the evidence and testimony offered by the Applicant was accepted into
2 the record and no evidence was excluded. This Decision must be read in conjunction
3 with the Statement of Opinion as the hearing was held to address the denial of the
4 Application for the reasons set forth in the Statement of Opinion. This Order considers
5 the new evidence and information presented by Applicant at the hearing and renders the
6 Final Order on this Application.

7 The Hearing Examiner, having reviewed the full record in this matter and being
8 fully advised in the premises, does hereby make the following:

9 **FINDINGS OF FACT**

10 **General**

- 11 1. Application To Change A Water Right No. 41QJ 30013407 in the name of and signed by
12 Christian C and Nora R Hohenlohe was filed with the Department on December 13,
13 2004. (Department file)
- 14 2. Notice of the Application was properly made in the Great Falls Tribune on November 17,
15 2005. (Department file)
- 16 3. The Environmental Assessment (EA), dated October 18, 2005, prepared by the
17 Department for this application was reviewed and is included in the record of this
18 proceeding. (Department file)
- 19 4. The noticed use of the water under Water Right Claim No. 41QJ 1707300 with a priority
20 date of August 22, 1892 and Water Right Claim No. 41QJ 1707400 with a priority date of
21 May 17, 1890 from Little Prickly Pear Creek diverted at a point in the SE¼SW¼SW¼ of
22 Section 36, Township 15 North, Range 4 West, Lewis and Clark County, Montana. The
23 notice stated that diversion for 193 acres of irrigation within Section 1, Township 14
24 North, Range 4 West, Sections 31 and 32, Township 15 North, Range 3 West and
25 Section 36, Township 15 North, Range 4 West, all in Lewis and Clark, Montana,
26 occurred from March 15 to October 15 at a combined rate of 32.5 cubic feet per second
27 (cfs) up to 6500 acre-feet per year. (Department file, Public Notice)
- 28 5. This Application proposes to change a portion of the two water rights to instream flow to
29 benefit the fishery resource. The Applicant stated that the amount of water needed to
30 run the pivots and provide flood irrigation water for the current irrigation of 193 acres is
31 3.5 cfs up to 515.2 acre-feet per year. Applicant will continue to irrigate the same acres
32 under this proposed change. The proposed "salvage" water saved from conversion from

flood to sprinkler irrigation to be changed is 29 cfs up to 3837.24 acre-feet per year. The additional new beneficial purpose will be fishery and the protected additional place of use will be the reach approximately 200 feet downstream from the headgate located in the SESWSW of Sec 36, TWP 15N, RGE 4W, Lewis and Clark County. (Department file, Change Application, Public Notice)

6. The application was publicly noticed and received one objection which was subsequently withdrawn and the Application was remanded to the Helena Regional Office for decision. (Department File).
7. The Application was denied in a Statement of Opinion from Helena Regional Office Manager Jan Langel dated January 28, 2008, the contents of which is hereby incorporated by reference.
8. The Application was denied based on failure to prove the criteria of Adverse Affect (including proof of the historic right to be changed) Beneficial Use, and Salvage 85-2-402(2)(a), (c) and (d), MCA. The Applicant also failed to meet all of the Mont. Code Ann. §85-2-408 requirements.
9. Criteria related to Adequacy of Appropriation works, Possessory Interest and Water Quality were not part of this hearing, 85-2-402(2)(b), (d), (f), and (g).
10. Applicant requested a show cause hearing on February 11, 2008. The Applicant requested a continuance of the hearing date, which was granted.

Historic Use

11. The basis for the change includes two Statement of Claims for water rights to divert water from Little Prickly Pear Creek by a headgate into Baxter Ditch. A letter dated 3/20/1980 (Department file) from the USDA SCS to Carl Kantorowicz included in the file stated that the headgate structure was designed to flow at a rate of 36 to 40 CFS. The claims remained as filed until they were amended in 2004 according to the consultant "to more accurately reflect the full extent of historic irrigation practices". These two rights are overlapping and are used on the same place of use. Below is a table of the rights as filed and amended:

Claim #	Priority	Date Filed	Flow Rate	Volume	Acres	Period of Diversion
17073	8/22/1892	4/3/1981	12.5 CFS	240 AF	60	4/15 to 10/15
Amended 6/18/2004				2500 AF	193	4/15 TO 10/15

17074	5/17/1890	5/15/1981	20 CFS	780 AF	193	4/15 to 10/15
Amended 6/18/2004				4000AF	193	4/15 to 10/15

The Lewis and Clark County Water Resource Survey, dated 1957 does not show 193 acres being irrigated. The field notes from and interview with the previous owner, Carl Kantorowicz, show irrigation from the Baxter Ditch totaling 113.00 acres within the place of use identified in the amended claim. The Water Resources Survey shows 117 acres being irrigated. DNRC's review of the place of use under the claim examination guidelines showed that the additional acres were either being irrigated or capable of irrigation at the time of the survey under the historic ditch system. The 1979 aerial photographs indicated flood irrigation of 189 acres rather than the claimed 193 (Department file). During the hearing Jon Westenberg pointed out that the discrepancy in acres is well within the accepted range used by DNRC in claim examination.

12. A letter from DFWP dated May 5, 1988 provided by the Applicant states that "large quantities" of water were diverted by the previous owner of the Hohenlohe property and water rights. A letter from Arnold E. Quale, District Conservationist of the Soil Conservation Service (now the NRCS) to Carl Kantorowicz dated March 20, 1980 stated that according to SCS records and engineering computations, the headgate (same as the current headgate) is designed to flow at a rate of 36-40 cubic feet per second or 1600 miners inches (Department File). During a field investigation, Jim Beck, HRO Engineer measured the ditch near the headgate and calculated the ditch capacity and velocity. The calculations are in his memorandum dated August 25, 2005. He wrote, for a ditch this size it is probable that the velocity is 1.0 to 1.5 ft/sec. This would mean the ditch capacity, at the high water mark, is 23 to 34 cubic feet per second. Information is already in the file from the NRCS indicating that the headgate has a capacity of 36-40 cfs. Refer to preceding paragraph (Department file). Witness for the Applicant, Jon Westenberg stated that the discrepancy is related to ditch capacity versus headgate capacity and that as pointed out in Exhibit A12, Jim Beck stated "information is already in the file from NRCS indicating that the headgate has a similar capacity". The claimed diversion rate is 32.5 CFS which is within the capacity of the diversion and conveyance system (Applicant witness testimony, Department file).

13. The applicant provided information on water availability in Exhibit A9. This information

1 includes USGS stream gauging station records from USGS 06071300 Little Prickly Pear
2 Creek at Wolf Creek, Montana which is located ½ mile upstream from the Hohenlohes'
3 point of diversion. Included in this information are water availability records from October
4 1, 1961 to September 30, 2007. The records indicate flow rates in cfs. The Application
5 stated that the entire flow of the stream was diverted during the period of use. The
6 USGS rates recorded (Exhibit A9) support the water availability in the amounts the
7 Application stated as diverted. An affidavit from J.C. Kantorowicz who was on the ranch
8 from 1948 to 1999 state that the headgate would support 36 to 40 cfs and was subject to
9 water availability often filled to capacity. A field investigation by Jim Beck, DNRC Ag-
10 Specialist indicated that ditch measurements show that the ditch could flow up to 34 cfs.
11 The Applicant has provided information which supports the diverted flow rate.
12 (Department file, Applicant witness testimony).

13 14. Witness for the Applicant, consultant Jon Westenberg stated that the flood system was
14 operated 24 hours a day and seven days of the week during diversion. Other than that,
15 the Applicant submitted no historical evidence or diversion records. He also stated that
16 this system was not an efficient system but that it worked well for the previous owner.
17 The system was filled to capacity subject to water availability. Water availability is
18 supported by USGS gauging records. (Applicant Exhibit A9, Department file, Applicant
19 witness testimony).

20 15. The Applicant did not provide information regarding the actual historic consumptive
21 volume which is available for this change. The Applicant's witness consultant Jon
22 Westenberg stated that the historic consumed volume is the entire amount diverted in
23 relation to the 200 feet of protected reach, i.e. no water historically returned to the reach
24 where the Applicant seeks supplement instream flow. There was no information provided
25 that discussed or accounted for the large volumes of water diverted but not consumed
26 by the crop. No analysis of seepage or return flow downstream was included in the file or
27 as an exhibit in the file. No evidence of actual historical use (as opposed to ditch
28 capacity and consultant estimates) including volume diverted and pattern of use was
29 submitted.

30 16. Applicant may change only that right as historically used. The Applicant has not proven
31 that they have historically used the entire diverted amount of the right they seek to
32 change. They have not shown what the historic consumed amount is other than to say it

1 is "the entire amount relative to the protected reach".

2
3 **Adverse Affect**

4 17. The Applicant analyzed adverse affect to one downstream water user on Little Prickly
5 Pear Creek. Department records show that Josephine Lahti has a Water Right Claim for
6 an irrigation water right of 25 cfs, with a priority date of 1890 at a location approximately
7 1 mile downstream for the Hohenlohe diversion. Witnesses for the Applicant stated that
8 this water right has issue remarks on the claim abstracts and that those issues could
9 cause a decrease in this right. The Claim remains as filed until such time as the issues
10 are resolved. Resolution of the issue remarks is exclusively within the jurisdiction of the
11 Montana Water Court. Witnesses for the Applicant testified that the proposed change of
12 use, which is already in place, has increased the amount of water available to Lahti. The
13 testimony also stated that the change has increased flow to downstream
14 users.(Department file, Applicant witness Liknes and Westenberg testimony)

15 18. The Applicant provided no information or analysis of the historic volume of water
16 consumed by the crop or how that diverted water not consumed by the crop returned to
17 the source. They did not provide an analysis of how changes to return flow may affect
18 other downstream water rights. Witness for the Applicant stated that this change does
19 not change the amount of water consumed by the crop but in explaining how water was
20 left for salvage simply stated that relative to the protected reach there are no return
21 flows. They also stated that relative to any users downstream the affect is unknown
22 because they are not trying to protect that reach. Return flow must go somewhere and
23 Applicant admits that the return flow was not available to the reach they seek to protect.
24 If the water that was previously return flow is now left in the reach, the return flow no
25 longer follows its previous path. Consequences of this change must be analyzed.
26 Applicant did not address where the historic return flows went which did not return to the
27 reach in which the Applicant now seeks to leave instream as "salvaged" flow.
28 (Department file, Applicant witness testimony).

29 19. The Applicant has failed to prove lack of adverse effect to downstream users. Analysis
30 of return flows is a fundamental part of any adverse effect analysis. While Applicant has
31 addressed impacts to Ms. Lahti, who will receive the instream flow, potential adverse
32 effects from diversion of return flow were not addressed. Applicant has failed to prove

1 the proposed change in appropriation right will not adversely affect the use of the
2 existing water rights of other persons or other perfected or planned uses or
3 developments for which a permit or certificate has been issued or for which a state
4 reservation has been issued.

5
6 **Beneficial Use**

7 20. Applicant witness George Liknes, MT FWP Regional Fisheries Manager for Region 4 in
8 relation to the amounts of water needed for the fishery. Mr. Liknes stated that for
9 optimum use by fish a flow rate of at least 70 cfs year round is needed on Little Prickly
10 Pear Creek. He stated that the reach of stream to be protected probably contains
11 several hundred fish per mile. He stated that this reach of Little Prickly Pear Creek is a
12 priority in trying to maintain fish populations in the Missouri River and stated keeping this
13 reach of stream flowing provides a substantial benefit to the fishery. Exhibit A3 is a copy
14 of a Future Fisheries Improvement Program Grant Application. Mr. Liknes was asked to
15 review the stated project benefits of the application. He agreed with the assessment that
16 the project will improve the fishery and benefit fish in Little Prickly Pear Creek. Exhibit A4
17 is an environmental assessment for the MTFWP Fisheries Division that addressed the
18 project. Mr. Liknes was again asked to review the assessment in that document which
19 shows the benefits of the fisheries. He agreed with the assessment. Mr. Liknes testified
20 that he has seen improved fish habitat and trout recruitment since the project was
21 implemented.

22 21. I find that the Applicant has proven that the proposed use of water is a beneficial use
23 and that the flow rate and volume are the amounts needed to sustain the proposed
24 beneficial use.

25
26 **Salvage Water**

27 22. The Application and Applicant witness Jon Westerberg's testimony indicated that the
28 sprinkler system requires significantly less water to be diverted from Little Prickly Pear
29 Creek than was required to flood irrigate the same place of use leaving sufficient water
30 instream at the point of diversion to be converted to instream flows. While Applicant
31 addressed diversion amount, Applicant did not address consumption and whether
32 sprinkler irrigation did or did not increase consumption of water. Changing from flood

1 irrigation to sprinkler irrigation does not change the amount of water consumed by the
2 crop. (Witness testimony, Department file). There was no analysis of consumption due to
3 evaporation. The Applicant did not provide any analysis of seepage or return flows which
4 provide the basis of information that would show what amounts of water were actually
5 utilized by the two historic water rights and how the protection of the entire amounts of
6 these rights instream would affect users downstream on Little Prickly Pear Creek and
7 beyond. Applicant did not prove that the proposed water-saving methods will salvage at
8 least the amount of water asserted by the Applicant.

9
10 **§ 85-2-408, MCA REQUIREMENTS**

11 23. The Applicant proposed to take stream flow measurements from the USGS gauging
12 station immediately upstream from their point of diversion stating that this provides more
13 accurate information than a staff gauge. They will also install a measuring device on
14 their pipeline which will record the amount diverted into the irrigation system. I find that
15 this does not provide “a detailed streamflow measuring plan that describes the manner
16 in which the streamflow must be measured” as required by § 85-2-408(1)(b), MCA. The
17 plan does not adequately measure the water left instream on the reach identified as
18 protected.

19 24. The Applicant did not provide information regarding the actual historic consumptive
20 volume which is available for this change. The Applicants witness Jon Westenberg
21 stated that the historic consumed volume is the entire amount diverted in relation to the
22 200 feet of protected reach. While that may be true for the protected reach in that water
23 does not return to the source in that stretch of the creek, there was no information
24 provided that discussed or accounted for the large volumes of water diverted but not
25 consumed by the crop. The Applicant has not proven what the historic consumed
26 amounts available for change are and have not met the requirements of § 85-2-408(7),
27 MCA.

28 25. The Applicant did not provide any analysis of return flow other than to say that the entire
29 200 feet to be protected was dewatered in the previous operation and did not receive
30 any return flow. They did not provide any information which discussed if there are any
31 return flows and where those flows show up in the system, whether in Little Prickly Pear
32 Creek, further points downstream, or elsewhere. The Applicant failed to meet the

1 requirements of § 85-2-408(3)(a), MCA. and § 85-2-408(7), MCA.

2 26. Applicant witness, George Liknes testified that by protecting the water requested to be
3 changed to instream flow from the point of diversion to 200 feet downstream, there is
4 significant benefit to the fishery. Mr. Liknes testified that at least 70 cfs was needed to
5 benefit the fishery and the reduction in diversion will and has already shown
6 improvements in fish habitat and fish recruitment. Applicant met the requirements of §
7 85-2-408(3)(b), MCA.

8 9 **CONCLUSIONS OF LAW**

- 10 1. The Department has jurisdiction to approve a change in appropriation right if the
11 appropriator proves the criteria in § 85-2-402, MCA.
- 12 2. The Department shall approve a change in appropriation right if the appropriator proves
13 by a preponderance of evidence the proposed change in appropriation right will not
14 adversely affect the use of the existing water rights of other persons or other perfected
15 or planned uses or developments for which a permit or certificate has been issued or for
16 which a state water reservation has been issued; except for a lease authorization
17 pursuant to § 85-2-436, MCA, a temporary change authorization for instream use to
18 benefit the fishery resource pursuant to § 85-2-408, MCA, or water use pursuant to § 85-
19 2-439, MCA, when authorization does not require appropriation works, the proposed
20 means of diversion, construction and operation of the appropriation works are adequate;
21 the proposed use of water is a beneficial use; except for a lease authorization pursuant
22 to § 85-2-436, MCA or a temporary change authorization pursuant to § 85-2-408, MCA,
23 or § 85-2-439, MCA, for instream flow to benefit the fishery resource, the applicant has
24 a possessory interest, or the written consent of the person with the possessory interest,
25 in the property where the water is to be put to beneficial use; if the change in
26 appropriation right involves salvaged water, the proposed water-saving methods will
27 salvage at least the amount of water asserted by the applicant; and, if raised in a valid
28 objection, the water quality of a prior appropriator will not be adversely affected; and the
29 ability of a discharge permitholder to satisfy effluent limitations of a permit will not be
30 adversely affected. §§ 85-2-402(2)(a) through (g), MCA.
- 31 3. In a change proceeding, it must be emphasized that other appropriators have a vested
32 right to have the stream conditions maintained substantially as they existed at the time of

1 their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727
2 (1908); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W.
3 Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942).

4 Montana's change statute reads in part:

5 85-2-402. (2) ... the department shall approve a change in appropriation
6 right if the appropriator proves by a preponderance of evidence that the following
7 criteria are met:

8 (a) *The proposed change in appropriation right will not adversely affect*
9 *the use of the existing water rights of other persons* or other perfected or planned
10 uses or developments for which a permit or certificate has been issued or for
11 which a state water reservation has been issued under part 3.

12

13 (13) A change in appropriation right contrary to the provisions of this
14 section is invalid. An officer, agent, agency, or employee of the state may not
15 knowingly permit, aid, or assist in any manner an unauthorized change in
16 appropriation right. A person or corporation may not, directly or indirectly,
17 personally or through an agent, officer, or employee, attempt to change an
18 appropriation right except in accordance with this section.

19 (italics added).

20 Montana's change statute simply codifies western water law.¹ One commentator
21 describes the general requirements in change proceedings as follows:

22 Perhaps the most common issue in a reallocation [change] dispute is whether
23 other appropriators will be injured because of an increase in the consumptive use of
24 water. Consumptive use has been defined as "diversions less returns, the difference
25 being the amount of water physically removed (depleted) from the stream through
26 evapotranspiration by irrigated crops or consumed by industrial processes,
27 manufacturing, power generation or municipal use." "Irrigation consumptive use is
28 the amount of consumptive use supplied by irrigation water applied in addition to the
29 natural precipitation which is effectively available to the plant."

30
31 An appropriator may not increase, through reallocation [change] or otherwise, the
32 actual historic consumptive use of water to the injury of other appropriators. In
33 general, any act that increases the quantity of water taken from and not returned to
34 the source of supply constitutes an increase in historic consumptive use. As a
35 limitation on the right of reallocation, historic consumptive use is an application of the

¹ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

1 principle that appropriators have a vested right to the continuation of stream
2 conditions as they existed at the time of their initial appropriation.

3
4 Historic consumptive use varies greatly with the circumstances of use.

5
6 Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991
7 edition) (italics added).

8 In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy
9 District, 717 P.2d 955 (Colo. 1986), the court held:

10 [O]nce an appropriator exercises his or her privilege to change a water right ...
11 the appropriator runs a real risk of requantification of the water right based on actual
12 historical consumptive use. In such a change proceeding a junior water right ...
13 which had been strictly administered throughout its existence would, in all probability,
14 be reduced to a lesser quantity because of the relatively limited actual historic use of
15 the right.

16
17 (italics added).

18
19 See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at
20 624 (1971)(changes in exercise of appropriative rights do not contemplate or
21 countenance any increase in the quantity of water diverted under the original exercise of
22 the right; in no event would an increase in the appropriated water supply be authorized
23 by virtue of a change in point of diversion, place of use, or purpose of use of water); A.
24 Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)(“A water
25 holder can only transfer the amount that he has historically put to beneficial use.... A
26 water holder may only transfer the amount of water consumed. The increment diverted
27 but not consumed must be left in the stream to protect junior appropriators.
28 Consumption is a function of the evapotranspiration of the appropriator’s crops.
29 Carriage losses are usually added to the amount consumed by the crops.”); Colo. Rev.
30 Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to
31 consider abandonment of the water right).

32 The requirements of Montana’s change statute have been litigated and upheld in
33 In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont.
34 425, 816 P.2d 1054 (1991)(applicant for a change of appropriation has the burden of
35 proof at all stages before the Department and courts, and the applicant failed to meet the
36 burden of proving that the change would not adversely affect objectors' rights; the

1 application was properly denied because the evidence in the record did not sustain a
2 conclusion of no adverse effect and because it could not be concluded from the record
3 that the means of diversion and operation were adequate).

4 Prior to the enactment of the Water Use Act in 1973 and the promulgation of
5 Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person
6 claiming the change adversely affected their water right, although the law was the same
7 in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co.,
8 Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing
9 denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont.
10 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963
11 (1974)(plaintiff could not change his diversion to a point upstream of the defendants
12 because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72,
13 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion
14 downstream, so long as he installed measuring devices to ensure that he took no more
15 than would have been available at his original point of diversion); Head v. Hale, 38 Mont.
16 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer
17 mining purposes cannot so change its use as to deprive lower appropriators of their
18 rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18
19 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining
20 purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for
21 irrigation purposes; the defendant then changed the place of use of his water right,
22 resulting in the water no longer being returned to the gulch - such change in use was
23 unlawful because it absolutely deprived the plaintiff of his subsequent right).

24 The DNRC in administrative rulings has held that a water right in a change
25 proceeding is defined by actual beneficial use, not the amount claimed or even decreed.
26 In the Matter of Application for Change Authorization No. G(W)028708-41I by
27 Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application
28 for Change Authorization No.G(W)008323-q76L by Starkel/Koester, April 1, 1992, Final
29 Order.

30 A key element of an evaluation of adverse effect to other appropriators is the
31 determination of historic consumptive use of water. Consumptive use of water may not
32 increase when an existing water right is changed. (In the Matter of Application to

1 Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor,
2 Final Order (2005); In The Matter of Application to Change a Water Right No. 40A
3 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order
4 adopted findings of fact and conclusions of law in proposal for decision); In the Matter of
5 Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC,
6 Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of
7 law in proposal for decision).

8 In a change proceeding, the *consumptive* use of the historical right has to be
9 determined:

10 In a reallocation [change] proceeding, both the actual historic
11 consumptive use and the expected consumptive use resulting from the
12 reallocation [change] are estimated. Engineers usually make these estimates.
13

14 With respect to a reallocation [change], the engineer conducts an
15 investigation to determine the historic diversions and the historic consumptive
16 use of the water subject to reallocation [change]. This investigation involves an
17 examination of historic use over a period that may range from 10 years to several
18 decades, depending on the value of the water right being reallocated [changed].
19

20

21 When reallocating [changing] an irrigation water right, the quantity and
22 timing of historic consumptive use must be determined in light of the crops that
23 were irrigated, the relative priority of the right, and the amount of natural rainfall
24 available to and consumed by the growing crop.
25

26

27 Expected consumptive use after a reallocation [change] may not exceed
28 historic consumptive use if, as would typically be the case, other appropriators
29 would be harmed. Accordingly, if an increase in consumptive use is expected,
30 the quantity or flow of reallocated [changed] water is decreased so that actual
31 historic consumptive use is not increased.

32 2 Water and Water Rights at § 14.04(c)(1).

33 The applicant in a change proceeding in Montana must prove the historic
34 beneficial use of the water to be changed, no matter how recently the water right was
35 decreed in Montana's adjudication. Although since Montana started its general
36 statewide adjudication there is no Montana Supreme Court case on point to support the
37 conclusion that even water rights as decreed in final decrees will be limited in change
38 proceedings to their historical use, that conclusion is supported by the case of McDonald
39 v. State, 220 Mont. 519, 722 P.2d 598 (1986). As a point of clarification, a claim filed for

1 an existing water right in accordance with § 85-2-221 MCA, constitutes *prima facie* proof
2 of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2,
3 Part 2, MCA. The claim does not constitute prima facie evidence of historical use for the
4 purposes of a change in appropriation proceeding before the Department under § 85-2-
5 402, MCA.

- 6 4. The Department finds that while the historic flow rate has been supported with water
7 availability records, headgate capacity and ditch measurements, the consumptive
8 volume has not been proven by a preponderance of evidence. They provided stream
9 gauging station records which supported the availability of the amounts claimed to be
10 diverted and stated that the Applicant diverted 24/7 when the irrigation system was in
11 operation. They also stated that the entire flow of the creek was diverted. They did not
12 provide any actual records of diversion or historical evidence to support the pattern of
13 diversion or volume. The amounts claimed are clearly much higher than needed for crop
14 consumption and no information was provided which explains whether those large
15 amounts of water were utilized or how, when and where they return to the source.
16 Applicant did not address return flows other than to state that they did not return to the
17 stream where Applicant proposes instream flow.

18 Return flow is a critical element that must be addressed to evaluate whether a
19 historic right will be expanded by a change in appropriation and whether there is adverse
20 effect to a water right holder. Matter of Application for Change of Appropriation Water
21 Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d
22 1054 1054 (application was properly denied because evidence did not sustain
23 conclusion of no adverse effect to others, in part because of the increased distance of
24 the new places of use to the creek under the proposed sprinkler irrigation system that
25 there would be significantly less immediate return flow to Ross Fork Creek); *In the*
26 *Matter of Application to Change a Water Right No.43BV-30001540 by Brockway Family*
27 *Partnership*, DNRC Proposal for Decision adopted by Final Order (2006)(change denied
28 in part because of no evidence of return flow); *In The Matter Of Application No. 76g*
29 *30010753 To Change Water Right Claim No. 76g 091377-00 By Jack A & John C*
30 *Perkins*, DNRC Proposal for Decision adopted by Final Order (March 2007)(change
31 denied, Applicant did not quantify historical consumptive use or effect on return flows to
32 Quinlan Sough or Dempsey Creek). The burden is on the Applicant to prove that

adverse effect will not occur. See, e.g., Brockway, supra; In The Matter Of Application To Change A Water Right No. 40M-30005660 by J. Harry Taylor II and Jacqueline R. Taylor, Final Order (2005); In The Matter Of Application For Change Of Appropriation Water Rights No. 101960-41S and 101967-41S by Keith and Alice Royston, DNRC Final Order (1989), 249 Mont. 425, 816 P.2d 1054 (1991). In addition, Applicant may only protect the historic amount consumed to maintain or enhance streamflows to benefit the fishery resource below the existing point of diversion. §85-2-408(7), MCA. As previously stated, the Applicant failed to submit sufficient evidence to prove the amount historically consumed. See Finding of Fact Nos. 11 – 16.

5. The Applicant has not proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected. See Finding of Fact Nos. 17 - 19.
6. The Applicant does not have to prove that the proposed means of diversion, construction, and operation of the appropriation works are adequate because this Application is for instream flow under § 85-2-408, MCA. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact No. 9.
7. The Applicant has proven by a preponderance of evidence that the proposed use is a beneficial use and that the flow rate and volume are the amounts of water needed to sustain the proposed beneficial use. § 85-2-402(2)(c), MCA. See Finding of Fact Nos. 20 and 21.
8. The Applicant does not need to prove a possessory interest in the property where water is to be put to beneficial use because this Application is for instream flow under §8 5-2-408, MCA. § 85-2-402(2)(d), MCA See Finding of Fact No. 9.
9. The application has not proven by a preponderance of evidence that the proposed water-saving methods will salvage at least the amount of water asserted by the Applicant, under § 85-2-402(2)(e), MCA. The Applicant bears the affirmative burden of proof to demonstrate that water will actually be salvaged. Id. See Finding of Fact No. 22.
10. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. §§ 85-2-402(2)(f), (g), MCA. See Finding of Fact No. 9.

1 11. The Applicant has not proven by a preponderance of evidence that the application meets
2 all of the requirements of Mont. Code Ann. § 85-2-408.

3 Under § 85-2-408(1)(a), MCA, the Applicant asserts a length of 200 feet, beginning at
4 the point of diversion and continuing downstream as the “length and location of the
5 stream reach in which the streamflow is to be maintained or enhanced.”

6 Under § 85-2-408(1)(b), MCA, the Applicant failed to provide “a detailed streamflow
7 measuring plan that describes the manner in which the streamflow must be measured”

8 Under § 85-2-408(2)(a), MCA, the Applicant met the requirements by proposing to
9 “change the purpose of a consumptive use water right to instream flow for the benefit of
10 the fishery resource.”

11 Under § 85-2-408(3)(a), MCA, the Applicant failed to prove that “the temporary change
12 authorization for water to maintain and enhance instream flow to benefit the fishery
13 resource, as measured at a specific point, will not adversely affect the water rights of
14 other persons.”

15 Under § 85-2-408(3)(b), MCA, the Applicant met the requirements by showing “the
16 amount of water for the proposed use is needed to maintain or enhance instream flows
17 to benefit the fishery resource.”

18 Under § 85-2-408(7), MCA, the Applicant has failed to prove the historic consumptive
19 use. The Applicant did not analyze return flows. In addition, there is no evidence that
20 any water will be salvaged because the Applicant proposes to continue all of the
21 irrigation.

22 See findings of fact Nos. 23 - 26.

23 12. Department shall approve a change in appropriation right if the appropriator proves by a
24 preponderance of evidence the criteria are met. Applicant has not proven all the criteria
25 are met. § 85-2-402(2) and § 85-2-408, MCA. See Conclusion of Law No. 4, 5, 9 and 11
26 4 above.

27
28 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of
29 Law, the Hearing Examiner makes the following:

30
31 **PROPOSED ORDER**

32 Application to Change A Water Right No. 41QJ-30013407 by Christian C. and

1 Nora R. Hohenlohe is **DENIED**.

2
3 **NOTICE**

4 A person who has exhausted all administrative remedies available within the
5 agency and who is aggrieved by a final decision is entitled to judicial review under the
6 Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition
7 for judicial review under this chapter must be filed in the appropriate district court within
8 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

9 If a petition for judicial review is filed and a party to the proceeding elects to have
10 a written transcript prepared as part of the record of the administrative hearing for
11 certification to the reviewing district court, the requesting party must make arrangements
12 for preparation of the written transcript. If no request for a written transcript is made, the
13 Department will transmit only a copy of the audio recording of the oral proceedings to the
14 district court.

15
16 Dated this 28th day of July 2008.

17
18 /Original signed by Jan E Langel/
19 Jan E Langel
20 Hearings Officer
21 Water Resources Division
22 Department of Natural Resources
23 and Conservation
24 PO Box 201601
25 Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties listed below on this 28th day of July 2008, by first-class United States mail.

JOHN E BLOOMQUIST, ESQ
ABIGAIL J ST LAWRENCE, ESQ
DONEY CROWLEY BLOOMQUIST PAYNE UDA PC
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/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
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